



U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEW DELHI, INDIA

Date: AUG 28 2007

IN RE:

Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v)
of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:

EXHIBIT COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), New Delhi, India, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of India who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States. The applicant is married to a naturalized citizen, [REDACTED]. He sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The OIC denied the waiver application finding that the applicant failed to establish hardship to a qualifying relative. *Decision of OIC, dated September 30, 2005.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

Section 212(a)(9)(B)(iii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii)(II), provides an exception to unlawful presence for asylees. It states that no period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, [REDACTED] April 4, 1998).

² *See* DOS Cable, note 1; and [REDACTED]

The procedural history of the instant case reflects the following. The applicant entered the United States without inspection on September 11, 1993. He applied for asylum in 1994. The legacy Immigration and Naturalization Service (now Citizenship and Immigration Service) denied his application on June 18, 1998. On November 27, 2000 the Immigration Judge found the applicant removable as charged and denied the applicant's application for asylum and withholding of removal. The applicant appealed the decision, which the Board of Immigration Appeals (BIA) dismissed on May 29, 2002. The applicant was permitted to voluntarily depart from the United States, which he did on July 28, 2002. *Decision of OIC, dated September 30, 2005; Decision of the BIA, dated May 29, 2002; U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court, Oral Decision of the Immigration Judge, dated November 27, 2000.*

The OIC found the applicant does not qualify for the asylee exception to unlawful presence on account of the applicant's working without employment authorization for more than two years after April 1, 1997.

The record reflects the following Employment Authorization Document (EAD) validity dates: 01/12/1995 to 01/12/1996; 01/13/1996 to 01/12/1997; 09/23/1997 to 09/22/1998; 08/17/1999 to 08/16/2000; 10/27/2000 to 10/27/2001; 03/12/2002 to 03/11/2003. The AAO notes an interval between the EAD validity dates from the period of 01/12/1997 to 09/23/1997 (8 months); from 09/22/1998 to 08/17/1999 (11 months); from 08/16/2000 to 10/27/2000 (2 months); and from 10/27/2001 to 03/12/2002 (4 months).

The record reflects that the applicant worked with Subway from June 1996 to present and with Speedway from June 1995 to June 1996. Biographic Information (Form G-325), signed 8/24/1997. The Form G-325 signed on 10/22/2004 shows employment with Subway from July 1996 to October 1998, and with Citgo/Open Pantry from October 1998 to July 2002.

Based on the EAD validity dates set forth above and the information in the G-325 Forms, the OIC was correct in finding that the applicant would have worked without employment authorization for a 2-year period, spanning from 01/13/1998 to 08/16/1999, 08/17/2000 to 10/26/2000, and 10/28/2001 to 03/11/2002.

On appeal, the applicant states that he worked with employment authorization during the pendency of the asylum application and that, except for a two month period, he did not work during the interval between the EAD validity dates. *Affidavit of Applicant, signed November 22, 2005.*

The AAO finds that there is an obvious inconsistency between the information in the submitted G-325 Forms and the applicant's statement on appeal. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO notes that there is no independent documentary evidence, such as letters from prior employers that would attest to employment dates. Thus, the AAO finds that the applicant has failed to demonstrate that he did not engage in unauthorized employment during the pendency of his asylum application; and he therefore has not established the asylee exemption to unlawful presence at section 212(a)(9)(B)(iii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii)(II). Based on the evidence in the record, the AAO agrees with the OIC's finding that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

In the denial letter, the OIC noted that the Immigration Judge and the BIA specifically address the frivolous claim issue (of the asylum application) and resolve it in the applicant's favor. The BIA states:

Although the Immigration Judge did not find that the written application was frivolous, he observed that it "appears to be false and extremely misleading." As the respondent filed his asylum application before April 1, 1997, and never received the required warnings against filing frivolous asylum claims, we agree with the Immigration Judge's resolution of the frivolous claim issue (I.J. at 5-7). See 8 C.F.R. § 208.3(c)(5).

However, the Immigration Judge did find the respondent's application was "exaggerated and misleading." The Immigration Judge stated that the "information in the Respondent's written application appears to be false and extremely misleading" and that the "exaggeration suggests that the Respondent's claims is [sic] frivolous and false." The Immigration Judge further stated that "[t]he fact that the Respondent may be eligible to immigrate to the United States in the future, should not be the reason for filing a frivolous and false request for asylum." Thus, the record establishes that the applicant's asylum application is not bona fide, as required by section 212(a)(9)(B)(iii)(II) of the Act.

The AAO will now address the finding that a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and his U.S. citizen child is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative, which in this case is the applicant's wife and parents. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

In the appeal brief, counsel makes the following statements. The applicant's wife and son live with his parents, who are lawful permanent residents, in Wisconsin. His siblings live in the United States. The applicant's wife works at a gas station and is the sole income earner in the family, earning \$24,000 annually. The family cannot afford medical insurance. The applicant's parents are 62 years old. The family suffers financial and emotional hardship without the applicant's presence. If the family returns to India, they would suffer imminent hardship due to the difficulty in finding employment. [REDACTED] has been suffering from severe anxiety and depression as a result of separation from her husband. The osteoarthritis in the knee joints of the applicant's mother impacts her mobility and ability to work; if she moved to India, she would be confined to her home. The applicant's father has central vision loss in the left eye due to solar retinopathy, surgery is recommended. Facilities to perform eye surgery are not available in India. The applicant's parents,

who care for their grandson, would find separating from him unbearable if [REDACTED] joined her husband in India. The applicant's wife would not be able to find work in India, where wages are extremely low. The applicant has not been able to find work in India since 2002; he is supported by his wife's income. Counsel states that the facts in *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) are distinguishable from the instant case; unlike the family in *Jong Ha Wang*, the Patel family has no assets or savings. Counsel states that the case *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) involves a waiver of the two-year foreign residence requirement for a J visa; it differs from the immediate case, which is about a hardship waiver for inadmissibility. [REDACTED] family's extreme hardship factors are not the same as those in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996).

In addition to other documents, the record contains letters from the applicant, his wife, and family members.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's spouse or parent must be established in the event that the spouse or parent joins the applicant; and in the alternative, that the spouse or parent remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Courts in the United States have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the BIA's finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). The Ninth Circuit in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

The AAO will now address whether the applicant's spouse or parent would endure extreme hardship if the waiver application is denied and they remain in the United States.

Counsel states that [REDACTED] provides the family's entire economic support. The applicant's parents are concerned about their well-being if their daughter-in-law returns to India. His mother states that she has never worked and would have to seek employment in the United States. The applicant's father states that he would not be able to find employment in the United States because of vision and eye problems. *Affidavit from Applicant's Father; Affidavit from Applicant's Mother*. The record reflects that the applicant indicated to the Immigration Judge that his U.S. citizen sister filed petitions for his parents to immigrate to the United States. *U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court, Removal Proceedings, Oral Decision of the Immigration Judge, dated November 27, 2000, page 6*. There is no evidence in the record demonstrating that the applicant's siblings who live in the United States are unable to financially support their parents. It is further noted that the Immigration Judge stated that the applicant owns a townhouse in the Chicago suburbs and has also purchased a gasoline business in Wisconsin, which he hopes to operate. *Id.* at 6. This indicates there are additional resources for the [REDACTED]. The AAO observes that the record contains no evidence of [REDACTED]'s earnings and the family's household expenses. In any case, even if the applicant were to show that his family endures economic hardship, U.S. courts have universally held that economic detriment alone is insufficient to establish extreme hardship. *See, e.g., INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (upholding BIA finding that economic loss alone does not establish extreme hardship) and *Mejia-Carrillo v. United States INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic loss alone does not establish extreme hardship, but it is still a fact to consider).

The record clearly reflects that the [REDACTED] is very concerned about separation from the applicant. The applicant's parents are worried about their daughter-in-law's depression about the separation of her two-year-old son from his father. The AAO is thoughtful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. However, the AAO finds their situation, if they remain in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship as defined by the Act. The record before the AAO is insufficient to show that the emotional hardship to be endured by the applicant's spouse and parents is unusual or beyond that which is normally to be expected upon deportation. *See Hassan and Perez, supra*.

The record is insufficient to establish that the applicant's spouse or parents would endure extreme hardship if they joined the applicant in India.

The conditions in India, the country where the applicant's spouse or parents would live if they joined the applicant, are a relevant hardship consideration. While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe

illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted).

The applicant's wife indicates that she immigrated to the United States when she was 20 years old and it has been almost 10 years since she left India. She states that her entire family and immediate family members are all in the United States. She further states that if she returns to India she will be compelled to live in a village in an environment where basic amenities such as adequate medical facilities, sanitation, and clean water are not available. The applicant's wife states that her son would have to undergo significant adjustments in India, such as the hot climate, lack of transportation, pollution, and lack of clean drinking water. [REDACTED] states that relocation would impact her two-year-old son's health. *Affidavit of the Applicant's Wife*. In her affidavit, the applicant's mother states that her village in India does not have proper facilities and drinking water and after living in the United States for so many years, it would be difficult to adjust to life in India.

Court decisions have shown that the difficulties the [REDACTED] may experience in obtaining employment in India, and the hardships that are a likely consequence of this, such as a lower standard of living and inadequate health care, are insufficient to establish extreme hardship. *See, e.g., Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir. 1986) (Even a significant reduction in the standard of living is not by itself a ground for relief); *Kuciamba v. INS*, 92 F.3d 496, 500 (7th Cir. 1996), (citing *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir.1985)) ("General economic conditions in an alien's native country will not establish "extreme hardship" in the absence of evidence that the conditions are unique to the alien."); *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980) (upholding the BIA's finding that hardship in finding employment in Mexico and in the loss of group medical insurance did not reach "extreme hardship"); *Pelaez v. INS*, 513 F.2d 303 (5th Cir. 1975) (difficulty in obtaining employment and a lower standard of living in the Philippines is not extreme hardship); and *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir.1986) ("the difficulty of readjusting to life in Mexico "is the type of hardship experienced by most aliens who have spent time abroad")(citing *Sullivan*, 772 F.2d at 610).

It is noted by the AAO that the location where the applicant presently resides in India, Ahmedabad, Gujarati, is considered the largest city in the state of Gujarat and the seventh-largest urban agglomeration in India, with a population of almost 5.3 million. It is also noted that the applicant's father had not yet immigrated to the United States in November 27, 2000. There is no evidence in the record establishing the date in which the applicant's mother immigrated to the United States. Thus, readjustment to life in India would not be as difficult for the applicant's parents as it may be for his wife. *See, Ramirez-Durazo, supra*. Although the applicant's wife states that her entire family and immediate family members are all in the United States, there is no corroborating evidence showing they are in legal status here.

In her affidavit, the applicant's mother states that the medical facilities in India are inferior to those in the United States. "Second class" medical facilities in foreign countries are not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984).

The applicant's father indicates that he requires eye surgery that is unavailable in India. *Affidavit of Applicant's Father*. Although the applicant's father states that he has a vision problem that requires treatment that is not available in India, the record contains no documentation of his condition and no evidence showing that treatment is unavailable in India. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec.

158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO is not persuaded by counsel's assertion that the applicant's mother would endure extreme hardship in India due to osteoarthritis in her knee joints. There is no indication of how serious the problems may be or what treatment is necessary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

Although hardship to the applicant's child is not a consideration under section 212(i) of the Act, the hardship endured by the applicant's wife, as a result of her concern about the well-being of her son, is a relevant consideration. The applicant's wife states that if her young son relocated to India he would be deprived of a U.S. education. With regard to a child's education in a foreign country, in *Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir. 1986), the Ninth Circuit stated that "[t]he disadvantage of reduced educational opportunities for the children was also considered by the BIA and found insufficient to establish "extreme hardship." It also stated that "[a]lthough the citizen child may share the inconvenience of readjustment and reduced educational opportunities in Mexico, this does not constitute "extreme hardship." In *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979), the Ninth Circuit states that "[w]hile changing schools and the language of instruction will admittedly be difficult, Banks herself admitted that her child would be able to learn the German language. The possibility of inconvenience to the citizen child is not itself sufficient to constitute extreme hardship under the statute." Thus, the AAO is mindful of but not persuaded by the claim of reduced educational opportunities for the Patel's son. The AAO notes that the record does not contain a birth certificate of the applicant's son.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.